IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14-07-2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE S.R. SINGHARAVELU

WRIT PETITION NO.2199 OF 2003

D. Kulasekaran
S/o.K. Dhuruvan
Plot No.100, Mangalanagar,
6th Cross Street, Porur,
Chennai 116. .. Petitioner

Vs.

1. The Government of Tamil Nadu,
   rep. by its Secretary,
   Home (Courts IA) Department,
   Fort St. George, Chennai 9.

2. The High Court, Madras
   rep. by its Registrar General,
   High Court Buildings,
   Chennai 104.

3. The Secretary, Law Department,
   Government of Tamil Nadu,
   Fort St. George, Chennai 9. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Certiorarified Mandamus calling for the records relating to the order of the first respondent issued in G.O.(2D) No.109, Home (Courts IA) Department, dated 12.4.2001 implemented in notification No.63/2001 in ROC.No.46/2001-Con.B1 dated 26.6.2001 of the second respondent and the order passed in Review Application by the 1st respondent in G.O.Ms.No.1033, Home (Courts IA) Department dated 31.10.2002, quash the same and direct the respondents to restore the petitioner in service from 26.6.2001 with salary and other benefits.

For Petitioner : Mr.R. Gandhi
Senior Advocate for
Mr. Paulvasantha Kumar

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

For Respondents 1&3 : Mr.S.V. Duraisolaimalai
Govt. Advocate
For Respondent-2 : Mr.B. Rajendran

J U D G M E N T

P.K. MISRA, J

The petitioner has challenged the order of compulsory retirement dated 12.4,.2001 passed by the first respondent, namely, the Government of Tamil Nadu, represented by the Secretary in the Home Department.

2. The facts giving rise to the present writ petition are as follows :-

The petitioner was initially appointed on 14.12.1974 in the Revenue Department. Subsequently, the petitioner passed B.L., and was transferred to Law Department with effect from 6.3.1982. Thereafter, the petitioner applied for the post of District Munsif-cum-Judicial Magistrate for recruitment by transfer and being so selected, he was posted as Judicial Magistrate with effect from 10.8.1992. The petitioner, however, retained his lien in the Law Department. On 2.3.1998, the Law Department called upon the petitioner to indicate his willingness to be absorbed in the Judicial Service or to be reverted back to the Law Department. On 27.3.1998, the petitioner requested for three months time to express his willingness. On 14.5.1998, the third respondent, namely, the Secretary to the Government, Law Department, directed the petitioner to express his willingness or otherwise on or before 31.5.1998. On 28.5.1998, the petitioner sent a reply indicating that he was willing to serve in the Law Department after serving for some more time in the Judiciary. On 9.9.1999, the petitioner was served with a letter to indicate the period for which he was willing to serve in the Judicial Department. Accordingly, on 27.10.1999, petitioner sent his reply indicating that he was willing to serve in the Judiciary for three more years. However, no other communication was served on the petitioner in that context. Subsequently, on 31.8.2000, the petitioner expressed his willingness to revert back to the Law Department. However, no formal reply was communicated to the petitioner. While the matter stood thus, on the basis of some complaints sent by an Advocate, the second respondent, namely, the High Court, suspended the petitioner on 8.2.2001 under Rule 17(3) of the Fundamental Rules and subsequently, on 27.2.2001 the second respondent called for an explanation. On 30.3.2001, the petitioner submitted his explanation. Subsequently, the order of suspension was revoked on 22.6.2001 and the petitioner was allowed to rejoin on 25.6.2001.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

However, on 26.6.2001, an order dated 12.4.2001, issued by the Government of Tamil Nadu, represented by the Secretary in the Home Department, was served on the petitioner compulsorily retiring him from service. Review Application was filed on 18.7.2001. However, such Review Application was dismissed on 31.10.2002. Thereafter, the present writ petition has been filed challenging the order of compulsory retirement.

3. The following contentions have been raised in the writ petition and pressed into service at the time of hearing of the writ petition.

(i) The order of compulsory retirement is in effect on the order of punishment inasmuch as the petitioner was suspended by order dated 8.2.2001 based on the allegations made against the petitioner, but only four days thereafter, the High Court recommended for compulsory retirement of the petitioner. The recommendation of compulsory retirement and the subsequent order in the background of a departmental proceeding clearly indicates that the order of compulsory retirement was passed as a measure of punishment.

(ii) The petitioner completed the age of 50 only on 26.6.2001, but the decision to retire him compulsorily was taken by the first respondent on 12.4.2001, even before the petitioner has completed 50 years, which is not contemplated under Rule 56(2) of the Fundamental Rules.

(iii) The substantive appointment of the petitioner was in the Law Department and such lien was continuing in the Law Department and yet the order has been passed by the Home Department, which is not the appointing authority so far as the petitioner was concerned.

(iv) The order of compulsory retirement has been passed mechanically on the basis of the recommendation of the High Court without proper appraisal of the performance of the petitioner and inspite of several good entries in the Annual Confidential Report.

4. Two separate counter affidavits have been filed by the respondents, one by the Secretary to the Government of Tamil Nadu, Home Department, and another by the High Court represented by the Registrar General. However, no separate counter has been filed by the third respondent, namely, the Secretary of the Law Department, Government of Tamil Nadu.

In the counter affidavit filed on behalf of the first respondent, the counter filed on behalf of the second respondent, namely the High Court, has been adopted. It is therefore necessary to refer only to the counter affidavit of the second respondent. In such counter affidavit, it has been narrated that a complaint has been received from one Advocate on the basis of which the Special Officer in the Vigilance Cell in the High Court seized the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

records relating to Case No.856/98, which discloses serious irregularities and on the basis of the aforesaid, the Administrative Committee of the High Court resolved to place the petitioner under suspension and accordingly, an order was passed on 8.2.2001. It has been further indicated in the counter affidavit that the order of compulsory retirement is based on the resolution of the Administrative Committee on 11.7.2000, which was approved by the Full Court on 29.8.2000. On the basis of such resolution, the Government had taken decision on 12.4.2001 to compulsorily retire the petitioner and such order was served on the petitioner on his attaining the age of 50, i.e., on 26.6.2001. The Review Application filed by the petitioner was also placed before the Administrative Committee on 8.11.2001, which recommended that such Review Application should be rejected and thereafter the Government rejected the Review Application on 31.10.2002. The allegation that the order of compulsory retirement was passed as a measure of punishment on the basis of the allegation made by the Advocate had been denied and it has been indicated that as per the guidelines in G.O.Ms.No.623 dated 14.7.1983, the case of the petitioner for review under Rule 56(2) was taken up for consideration well in advance before the petitioner had attained the age of 50 and recommendation was made that he was not fit to continue beyond the age of 50 at a time when no departmental proceeding had been initiated or was in contemplation. It has been further clarified that even though the Government took the decision on 12.4.2001, such order was served only on 26.6.2001, after the petitioner completed the age of 50, and therefore, there is no violation of Rule 56(2) of the Fundamental Rules. It has been further indicated that the recommendation to compulsory retire the petitioner was taken on the basis of the entries made in the Annual Confidential Report. So far as the contention that the order of compulsory retirement had been passed by an incompetent authority, a reference has been made in the counter affidavit to Fundamental Rule 56(2) Explanation V to the effect that the powers conferred on the "appropriate authority" may also be exercised by any higher authority. The specific stand is to the following effect:-

> "... As per the explanation V, the powers conferred on the competent authority may also be exercised by any higher authority. The said officer was a government servant and the Government, viz., the Governor is the highest authority and the order of compulsory retirement was passed by the Governor of Tamil Nadu. Hence the contention that the order can be passed only by the third respondent, viz., the Secretary, Law Department and not by the first respondent, is wrong."

5. In course of hearing of the writ petition, the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

respondents had been called upon to produce relevant records relating to the order of compulsory retirement and such records have been produced.

6. So far as the first contention is concerned, it has been submitted by the counsel for the petitioner that the order of compulsory retirement in the background of order of suspension and the allegations made against the petitioner and the explanation furnished by him, the order of compulsory retirement smacks punishment, which is not contemplated in law. In support of such contention, learned counsel for the petitioner has placed reliance upon several decisions of the Supreme Court wherein it has been held that an order of compulsory retirement in the background of pending of departmental proceeding, particularly relating to serious allegations, is vulnerable as such an order of compulsory retirement takes the colour of punitive measure. However, in the present case, such principle is not attracted in view of the materials on record which clearly indicate that the proposal to retire the petitioner by invoking Rule 56(2) had been submitted by the Administrative Committee on 11.7.2000 and approved by Full Court on29.8.2000 at a time when there was no contemplation of any departmental proceeding nor order of suspension had been passed. It is of course true that by the time the Government accepted the recommendation of the High Court and took a decision to retire the petitioner compulsorily, he was placed under suspension on the basis of the allegations subsequently made against him, but the basic fact remains that such decision of the Government was on the basis of the recommendation made by the High Court much before initiation of any departmental proceeding. The contention of the petitioner to the effect that the order of compulsory retirement was a measure of punishment is therefore not acceptable.

7. Next submission made by the Counsel for the petitioner to the effect that the decision to retire the petitioner Rule 56(2) having been taken by the Government in April, 2001, when the petitioner was yet to complete 50 years, such decision was contrary to the provisions contained in Rule 56(2) of the Fundamental Rules. Rule 56(2) contemplates that the Appropriate Authority can retire a Government Servant in public interest by giving appropriate notice or pay and allowance in lieu of such notice at any time after he had attained the age of 55 years or on completion of 30 years of qualifying service. It is of course true that order was made on 12.4.2001. Merely because the decision to retire a person by invoking Rule 56(2) is taken a few months before the employee attaining the age of 50, such a decision is not vitiated as the decision has been given effect to in the present case only after the petitioner had completed 50 years. There is no requirement in the Rule that the question of compulsory retirement can only be taken up for consideration after completion of the age of 50. What

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

is contemplated is that the person can be compulsorily retired only after such person has completed the age of 50. The second contention is therefore not acceptable.

8. The third contention of the counsel for the petitioner, however, appears to be on a much stronger footing. The contention of the petitioner is to the effect that he was an employee under the Law Department, and he was serving in the Judicial Department only on the basis of transfer, and he continued to have lien in the Law Department, and therefore, the order of compulsory retirement passed by the Home Department is not sustainable and order if any could have been passed only by the Law Department.

9. The relevant assertion in the counter affidavit of Respondent No.2 is already extracted. The sum and substance of the extracted portion is to the effect that compulsory retirement under Rule 56(2) can be passed by the appropriate authority or any higher authority as contemplated in Explanation-V. It has been contended that since the order of compulsory retirement has been passed by the Governor, who is the highest authority, there is no illegality in the order. The basic assertion that the petitioner had lien in the Law Department and must be taken to be an employee under the Law Department, has not been controverted in any manner in the counter affidavit filed by Respondent No.2. As already indicated, Respondent No.1 has merely adopted the counter filed by Respondent No.2. Apart from the fact that specific assertion of the petitioner that he had lien in the Law Department was not challenged, the materials on record also clearly indicate that the petitioner continued to have his lien in the Law Department. Various correspondences clearly indicate that the petitioner was called upon to exercise his option either to continue in the Law Department or to be absorbed in the Judicial Department by letter dated 2.3.1998, sent by the Law Department. The petitioner at that stage had initially sought for more time to express his willingness and subsequently had replied on 28.5.1998 that he was willing to serve in the Law Department after serving some more time in the Judiciary. Pursuant to the subsequent communication dated 29.4.1999, sent by the third respondent, namely the Secretary in the Law Department, the petitioner had given a reply dated 27.10.1999 indicating his willingness to serve in the Judiciary for three more years. In other words, the petitioner had never opted for being permanently absorbed in the Judiciary nor any order has been passed at any time absorbing him in the judiciary permanently. As a matter of fact, subsequently, on 31.8.2000, the petitioner expressed his willingness to revert back to the Law Department. No reply had been given by the Law Department to the above two letters dated 27.10.1999 and 31.8.2000 sent by the petitioner. Even in G.O.Ms.No.145 dated 25.6.2004 issued by the Law Department, while

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

indicating the seniority list, the name of the petitioner was shown at Serial No.8 with remarks within the bracket to the effect "not in service". Since the lien of the petitioner in the Law Department had never been terminated and he had indicated his willingness to continue to serve under the Law Department, there is no escape from the conclusion that the petitioner continued to be in service in substantive capacity in the Law Department and he was merely serving in the Judiciary or the Judicial Department on the basis of transfer. As already indicated, this position has not at all been controverted in any of the counter affidavits. It is thus obvious that the petitioner must be taken to be a permanent employee under the Law Department and not under the Home Department. In the aforesaid background, the contention of the petitioner that the order of compulsory retirement issued by the Secretary of the Home Department is vitiated is to be considered carefully.

10. The only stand taken by Respondent No.2 is to the effect that the order of compulsory retirement can be passed by the appropriate authority or by any higher authority and in the present case, such order has been passed by the Governor, namely the highest authority. It is not the case of Respondent No.1 or Respondent No.2 that the Secretary, Home Department is the appropriate authority. The only question therefore to be considered is as to whether the order has been passed by the higher authority in accordance with the procedure contemplated in Rule 56 (2) Explanation-V of the Fundamental Rules.

11. The order of compulsory retirement dated 12.4.2001 is passed by the Home (Courts IA) Department. In such order, it has been recited that the Governor of Tamil Nadu has decided to accept the recommendation of the High Court. The order is expressed to be in the name of the Governor and has been signed by the Secretary to the Government in the Home Department. Article 166 of the Constitution, which is relevant for the purpose of deciding the question, is extracted hereunder :-

> "166. Conduct of business of the Government of a State.-(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
>
> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.
>
> (3) The Governor shall make rules for the more convenient transaction of the business of the Government

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

12. In the present case, even though the order is expressed to be taken in the name of the Governor, it cannot be said that the order has been authenticated in the manner specified in the Rules. There cannot be any two opinion regarding the fact that the order is to be authenticated by the concerned person in the appropriate department. If the order pertains to the Law Department, it is obvious that it can be authenticated only by the competent authority in the Law Department and similarly if the matter pertains to the Home Department, it can be done so by the Secretary or any competent authority in the Home Department. Where a matter pertains to a particular Department, if it is authenticated by a Secretary of another Department, it cannot be said that the order has been passed by the higher authority, and therefore, the order is valid. In this connection, the decision of the Supreme Court in A.I.R. 1959 SC 65 (Messrs. Gahio Mal & Sons v. State of Delhi and others) is relevant.

13. In the present case, the files have been produced. It is obvious from the files that the matter has been dealt with by the Home Department and not by the Law Department. Nothing has been indicated that the matter has at all been considered by the appropriate department, namely, the Law Department. It cannot be said that the order has been passed by the appropriate authority as contemplated in Rule 56. On the basis of the aforesaid conclusion, since the order of compulsory retirement has not been passed by the "appropriate authority", such order of compulsory retirement must taken to be as null and void.

14. In view of the aforesaid conclusion, it is not necessary to consider the last contention to the effect that the order of compulsory retirement has been passed arbitrarily and the materials on record do not justify such order.

15. In view of the conclusion relating to the third contention, the order of compulsory retirement is bound to be quashed and it must be taken that the petitioner is deemed to be in service and as a necessary corollary, will be entitled to all pecuniary benefits. Since the petitioner has already indicated his willingness to go back to the Law Department, he must be taken to have been reverted to the Law Department. It would be open to the appropriate authority in the Law Department to consider as to whether the petitioner is to be compulsorily retired in accordance with Rule 56 or any departmental proceeding is to be initiated or revived in respect of the allegations made against him.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

16. Subject to the aforesaid clarifications, the writ petition is allowed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

dpk

To
1. Secretary,The Government of Tamil Nadu,
   Home (Courts IA) Department,
   Fort St. George, Chennai 9.

2. The High Court, Madras
   rep. by its Registrar General,
   High Court Buildings, Chennai 104.

3. The Secretary, Law Department,
   Government of Tamil Nadu,
   Fort St. George, Chennai 9.

1 cc to Mr.N. Paul Vasanthakumar, Advocate, SR. 28726
1 cc to Mr.B. Rajendran, Advocate, SR. 28846

W.P.NO.2199 OF 2003

JE (CO)
kk 1/8

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/